Filed 5/19/09 P. v. Russo CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. WAYNE RUBEN RUSSO, Defendant and Appellant.	F055554 (Super. Ct. No. CRF24620) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tuolumne County. William G. Polley, Judge.

Alex Green, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

-ooOoo-

[*] Before Levy, Acting P.J., Cornell, J., and Gomes, J.

It was alleged in a criminal complaint filed on July 17, 2007, and deemed an information on September 6, 2007, that appellant Wayne Ruben Russo committed sexual penetration with a foreign object by means of force and violence (Pen. Code, § 289, subd. (a)(1); count 1)[1] and false imprisonment by violence (§ 236; count 2), and that appellant had suffered a "strike"[2] and two prior convictions which rendered him ineligible for probation absent unusual circumstances (§ 1203, subd. (e)(4)), and had served a prison term for a prior felony conviction (§ 667.5, subd. (b)). On February 19, 2008, pursuant to a plea agreement, appellant pled guilty to the false imprisonment charge and admitted the strike allegation.

On April 1, 2008, appellant filed a notice of motion to withdraw his plea. On April 14, 2008, the court heard and denied the motion. On that same date, in accordance with the plea agreement, the court imposed a prison term of 32 months, consisting of the 16-month lower term on the substantive offense, doubled pursuant to the three strikes law (§§ 667, subd. (e)(1); 1170.12, subd. (c)(1)).

On June 11, 2008, appellant filed a notice of appeal and requested the court issue a certificate of probable cause (§ 1237.5). The court denied the request.

Appellant's appointed appellate counsel has filed an opening brief, which summarizes the pertinent facts, with citations to the record, raises no issues, and asks that this court independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) Appellant, in response to this court's invitation to submit additional briefing, on March 9, 2009, filed a letter brief in which he challenges the validity of his plea. In addition,

---

[1] All further statutory references are to the Penal Code.

[2] We use the term "strike" as a synonym for "prior felony conviction" within the meaning of the "three strikes" law (§§ 667, subds. (b)-(i); 1170.12), i.e., a prior felony conviction or juvenile adjudication that subjects a defendant to the increased punishment specified in the three strikes law.

appellate counsel, in compliance with an order from this court, has submitted a declaration in which he indicates issues appellant wishes to raise on appeal.[3] We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Facts[4]

Tuolumne County Sheriff's Deputy Victor Serrano, Jr. testified to the following. At approximately 2:00 a.m. on July 15, 2007 (July 15), he and Sergeant Hunt, in response to a "suspicious circumstance call," went to a location in Jamestown and made contact with Joseph Hart, who told Deputy Serrano the following. Hart had been outside a bar located nearby shortly after 2:00 a.m. when he was approached by a "female subject who was upset, crying, and asked him if she could use his cell phone." Hart handed the woman his phone and she made a call, at which point a "heavily tattooed" man approached, "walked up to the female and slightly [*sic*] grabbed her around the back of the neck ...." At some point after that a second male subject approached, stated that the tattooed male subject was the woman's brother, and that the woman was "okay." Shortly

---

3 On November 10, 2008, appellant submitted to this court a letter brief, prepared, according to appellant, with the assistance of a fellow inmate, in which he indicated, inter alia, that he is "dyslexic and as a result ... illiterate," and asked that appellate counsel be discharged and new appellate counsel be appointed. By its order of November 14, 2008, this court denied appellant's request and, "[i]n light of appellant's illiteracy and in order to assure appellant that his concerns were considered by appointed counsel," directed appellate counsel to contact appellant; "identify the issues appellant wishe[d] to raise on appeal or in petition for writ of habeas corpus"; and prepare and submit to this court "a declaration listing [those] issues." In response to this court's directive, appellate counsel filed a declaration (issues declaration) with this court on December 15, 2008.

4 Our factual statement is taken from testimony adduced at appellant's preliminary hearing.

thereafter, the tattooed male subject "walked back into the bar," and "the female apparently followed him ...."

Deputy Serrano testified further that Hart provided a description of the second male subject, and that based on the description, the deputy thought that person was appellant, whom the deputy knew from prior contacts to be the owner of the bar.

Corporal Kelly Dickson of the Tuolumne County Sheriff's Department testified he arrived at the bar called the "Winkin' Lantern" in Jamestown shortly after 3:00 a.m. on July 15.[5] There was a motel located near the bar, and he saw Sergeant Hunt knocking on the door of one of the motel rooms, loudly identifying himself as a member of the Sheriff's Department. Corporal Dickson approached, and heard a female voice, coming from inside the room saying, "Don't. Please no. I don't want to. Please stop." Sergeant Hunt again yelled "Sheriff's department," at which point Corporal Dickson heard a male voice, which he recognized to be that of appellant, say something like "Who's there?" Both Sergeant Hunt and Corporal Dickson yelled again. They heard "some rustling around," possibly that of "getting up, getting clothes on," and approximately 45 seconds later the door opened and a female came out. She was "[v]ery emotional" and scared; she was "crying"; and her whole body was "shaking." "[A]ll she could say [was], 'I want to go. I want to go home.'"

Corporal Dickson asked the woman "what happened." Initially she said she "couldn't talk" because "[t]here were still people listening" and "[t]hey would get her." Eventually, she told the corporal she had gone to the bar the previous night and she had had sex, but this night was "different" and she "just wanted to go home." Corporal Dickson "asked her if she was forced, and she said yes." The corporal then asked her if

[5] The remainder of our factual statement is taken from Kelly Dickson's testimony.

she "was forcibly raped," and the woman "said, 'Yeah,' and then she said, 'No, it ... was just with sex toys,' or something to that effect, 'so that's not rape.'"

Corporal Dickson later entered the room, and found on the bed a "sex object, toy ...."

Appellant's Contention in Motion to Withdraw Plea

In support of his motion to withdraw his plea, appellant submitted a report of a defense investigator, consisting of what the investigator indicated was a transcript of an interview conducted with the victim on March 14, 2008, in which the victim indicated the following: On two nights in July 2007, she went to the "Winkin [*sic*] Lantern" bar "just west of Jamestown"; she was not raped on either of those nights; she recalled speaking to police on the second night and telling them "nothing happened" and she wanted to go home; she did not recall making a "statement that an alleged rape took place"; she "just [did not] remember what happened"; and on that night she "was drinking and ... did dope," but she did not know why she did not remember.

In his moving papers, appellant argued that at the time he entered his plea he was "ignorant of the exculpatory statement from the alleged victim taken by the defense," and "[t]his ignorance prevented [him] from entering into [a] knowing[ ] and intelligent plea."

DISCUSSION

In appellate counsel's issues declaration, counsel avers that appellant repeats his argument that the alleged victim, as evidenced by her March 2008 statement to the defense investigator, could not remember what happened the night of the charged offenses, and that if appellant had known this, he would not have pled no contest. In addition, counsel avers, "appellant told [him] that his plea of no contest was involuntary and ... [appellant's] will was overcome because: (1) at the time of the plea he was taking Prozac and was exhausted from lack of sleep due to his sleep disorder not being properly treated (he was not given the breathing machine he required and thus had to try to sleep

while leaning up against the wall), and (2) Attorney Mark Sullivan [appellant's trial counsel] lied to him and pressured him into entering his no-contest plea and told [him] that unless he did so he would go to prison for 17 years."

In his letter brief, appellant, as best we can determine, makes essentially the same arguments and, in addition, asserts that a Tuolumne County Sheriff's Office investigator interviewed the alleged victim on July 16, 2007, the day after appellant's arrest; in this interview, the alleged victim "remained steadfast to her position that NOTHING happened";[6] and appellant did not become aware of this interview until June 2008, well after he moved to withdraw his plea. Appellant indicates he would not have entered his plea had he known of this interview. He also argues that his trial counsel was constitutionally ineffective and the prosecutor was guilty of prosecutorial misconduct for failing to inform appellant of this interview.

All of the claims summarized above challenge the validity of appellant's plea. And as indicated above, the court denied appellant's request for a certificate of probable cause. Therefore, we may not consider these arguments on appeal. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1095 [challenge to validity of plea foreclosed by absence of certificate of probable cause]; *People v. Pannizon* (1996) 13 Cal.4th 68, 76 [same]; *People v. Stubbs* (1998) 61 Cal.App.4th 243, 244-245 [claim of ineffective assistance of counsel occurring prior to plea went to validity of plea and therefore not cognizable on appeal in absence of certificate of probable cause].)

---

6 Attached to appellant's letter brief are various documents, including what is apparently a copy of a transcript of a telephone conversation "between Alleged Victim and Officer Memmer 7/16/07," produced by the Tuolumne County Sheriff's Office in response to a subpoena duces tecum issued in a Board of Parole Hearings proceeding, in which, in response to questions as to the events of the evening prior to the interview at the "Winkin Lantern" [*sic*] the interviewee stated repeatedly, "nothing happened."

Moreover, with the exception of the victim's March 2008 statement to the defense investigator, the factual basis of appellant's claim that his plea was invalid consists entirely of matters outside the appellate record. Argument that relies on matters outside the record may not be considered on appeal. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1183.) To the extent appellant's challenge to the validity of his plea rests on evidence that is outside the appellate record, it must be raised, if at all, in a petition for habeas corpus. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [where claim of ineffective assistance of counsel depends on matters outside the record, it is "more appropriately decided in a habeas corpus proceeding"]; *In re Paul W.* (2007) 151 Cal.App.4th 37, 68 ["A petition for habeas corpus is proper where the claims will require consideration of matters outside the appellate record"].)

Should appellant choose to proceed by habeas corpus, his petition must first be filed in the trial court--not in this court. (*In re Hillery* (1962) 202 Cal.App.2d 293, 294.) "In a habeas corpus proceeding the petition itself serves a limited function. It must allege unlawful restraint, name the person by whom the petitioner is so restrained, and specify the facts on which he bases his claim that the restraint is unlawful. (§ 1474.) If, taking the facts alleged as true, the petitioner has established a prima facie case for relief on habeas corpus, then an order to show cause should issue." (*In re Lawler* (1979) 23 Cal.3d 190, 194.) "[C]ounsel must ... be provided for an indigent ... who brings a collateral attack on his conviction, once he has made 'adequately detailed factual allegations stating a prima facie case' ...." (*People v. Barton* (1978) 21 Cal.3d 513, 519, fn. 3.)

Separate and apart from appellant's contentions as set forth in his letter brief and counsel's issues declaration, we have also conducted a review of the record pursuant to *People v. Wende, supra,* 25 Cal.3d 436. Based on this review, we have concluded that no reasonably arguable legal or factual issues exist.

DISPOSITION

The judgment is affirmed.